(2)

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 98-1386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, *et al.*,

Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MDL 926 PLAINTIFFS' STEERING COMMITTEE

LESLIE J. BRYAN
DOFFERMYRE, SHIELDS, CANFIELD, KNOWLES & DEVINE
1355 Peachtree St., Suite 1600
Atlanta, GA 30309
(404) 881-8900

ELIZABETH JOAN CABRASER
Counsel of Record
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

Attorneys for Respondents MDL 926 Plaintiffs' Steering Committee

152168

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

7788

QUESTION PRESENTED

Petitioners are six litigants who benefitted, along with over one hundred thousand others, from the common discovery and work product conducted by the MDL 926 Plaintiffs' Steering Committee and other plaintiffs' counsel in *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala.). Petitioners joined MDL 926 proceedings to gain access to this work product and to participate in a settlement program approved and administered by the transferee court.

Early in the MDL 926 proceedings, in July 1993, the transferee court issued Order No. 13 (Establishing Plaintiffs' Litigation Expense Fund to Compensate and Reimburse Attorneys for Services performed and Expenses Incurred for Common Benefit) to provide partial reimbursement of the time and expense incurred by plaintiffs' counsel for the common benefit, by assessing 6% on the prospective recoveries of breast implant claimants by trial or settlement. Petitioners did not timely object or appeal from Order No. 13, or a later related order (Order No. 27) issued in December 1995.

The court of appeals rejected petitioners' belated attempt to avoid payment of the assessment from their settlements by appeal from Order No. 30, issued by the District Court in March 1996, which chronicled, attached and summarized its pretrial orders (including Orders Nos. 13 and 27) for the convenience of the transferor courts in further proceedings. Petitioners' appeal was dismissed on the ground that Order No. 30 was not a final, appealable order.

At the time of their attempted appeal from Order No. 30, petitioners had participated in the MDL and been on notice

of the common benefit assessment for three years, and had requested and received substantial MDL 926 common benefit work product for their use in settlement or trial. No other challenge or appeal to the district court's common benefit orders is pending.

The question presented is whether Order No. 30, a non-final case management order that chronicles and summarizes the earlier orders of the MDL transferee court for the convenience of transferor courts on remand for further proceedings (including the two common benefit assessment orders that applied to Petitioners, which comport with settled law, and from which they took no timely appeal), is nonetheless appealable by Petitioners under the collateral order exception of *Cohen v. Beneficial Industrial Loan Corporation*.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	viii
Orders Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	10
Conclusion	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Allegheny Airlines, Inc. v. LeMay, 448 F.2d 1341 (7th Cir.), *cert. denied*, 404 U.S. 1001 (1971) 3

Blum v. Stenson, 465 U.S. 886 (1984) 16

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) ... 7, 16

Catlin v. United States, 324 U.S. 229 (1949) 19

Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1884) 7, 16, 19

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949) ..... ii, 1, 14, 16, 17, 19, 20

Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) 14, 20

In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985), modified on other grounds, 818 F.2d 226 (2d Cir. 1987) 11, 12, 13

In re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006 (5th Cir. 1977) 10, 11, 12, 18

In re Donald J. Trump Casino Securities Litigation, 7 F.3d 357 (3rd Cir.), *cert. denied, sub nom Gollump v. Trump*, 510 U.S. 1178 (1994) 2

Cited Authorities

Page

In re MGM Grand Hotel Fire Litigation, 660 F. Supp. 522 (D. Nev. 1987) 10, 18

In re Showa Denko K.K. L-Tryptophan Products Litigation, 953 F.2d 162 (4th Cir. 1992) 14

In re Telectronics Pacing Systems Inc., 953 F. Supp. 909 (S.D. Ohio 1997) 2, 3

Kopet v. Esquire Realty Company, 523 F.2d 1005 (2d Cir. 1975) 13

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1997) 2, 3, 11

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 7, 10, 16, 20

Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972); *Eluska v. Andrus*, 587 F.2d 996 (9th Cir. 1978) 4

Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983) 1

Smiley v. Sincoff, 958 F.2d 498 (2d Cir. 1992) 13

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 7, 10, 16, 18, 19, 20

Trustees v. Greenough, 105 U.S. 527 (1881) 7, 10, 15, 16, 19

Cited Authorities

Page

Statutes:

28 U.S.C. § 1291 ..... 1, 4, 14

28 U.S.C. § 1292(b) 4

28 U.S.C. § 1407 ..... 2, 3, 10

Rules:

Fed. R. Civ. P. 23 ..... 6, 10

Fed. R. Civ. P. 23(c)(1) 15

Other Authorities:

Awarding Attorneys' Fees and Managing Fee Litigation (Fed. Jud. Center 1994) 18

The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575 (1978) 11

Manual for Complex Litigation, Third, §§ 20.2, *et seq.* 13

Manual for Complex Litigation, Third, § 20.223 ... 11, 13

Manual for Complex Litigation, Third, §§ 31, *et seq.* 11

Cited Authorities

	Page
Manual for Complex Litigation, Third, § 31.131 ...	3
Manual for Complex Litigation, Third, § 31.132 ...	3
Manual for Complex Litigation Third, § 31.133 (Federal Judicial Center 1995)	1, 3
Silicone Breast Implant Industry: Historical Chronology to the Documents Produced in MDL 926 (March 1994)	8

TABLE OF APPENDICES

Page

Appendix A — Order No. 30 Of The United States District Court For The Northern District Of Alabama, Southern Division Dated March 25, 1996 And Filed March 26, 1996 ..... 1a

ORDERS BELOW

The complete text of the District Court's case management order, Order No. 30, from which petitioners attempted to appeal is set forth in full in Respondents' Appendix, pages 1a-47a.

The District Court's Order No. 13 and pertinent provisions of Order No. 27 are set forth in Petitioners' Appendix, pages 1a-7a.

The Orders of the United States Court of Appeals for the Eleventh Circuit dismissing petitioners' appeal because the District Court's Order No. 30 is not a final appealable order, and denying petitioners' petition(s) for rehearing and suggestion(s) of rehearing *en banc*, are set forth in Petitioners' Appendix, pages 8-10.

STATEMENT OF JURISDICTION

The order of the Court of Appeals dismissing petitioners' appeal was entered on October 6, 1998. Its order denying rehearing was entered on December 4, 1998.

Petitioners invoke 28 U.S.C. § 1291, which provides that "the Court of Appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." The District Court's March 26, 1996 Order No. 30 (Pretrial and Revised Case Management Order) is not a final and appealable order within the meaning of 28 U.S.C. § 1291, or any exceptions thereto. Accordingly, the Eleventh Circuit did not have jurisdiction to entertain it, *see Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983), and this Court should not review it. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

STATEMENT OF THE CASE

On March 26, 1996, the District Court entered its Order No. 30 (Pretrial and Revised Case Management Order), the subject of this appeal, pursuant to § 31.133 of the *Manual for Complex Litigation Third* (Federal Judicial Center 1995), to provide, as the *Manual* recommends, a chronicle of the MDL 926 proceedings, and a

summary of the "rulings that will affect further proceedings" in the courts to whom MDL 926 cases were to be remanded. Order No. 30 made no new rulings. The purpose and function of Order No. 30 is stated in its introduction:

> In view of the recent remand or transfer of a substantial number of breast implant cases, and in anticipation of further remands and transfers, this Court, in accordance with § 31.133 of the *Manual for Complex Litigation, Third*, and after consulting with and receiving suggestions from the parties, is entering this Order to chronicle the proceedings, summarize significant rulings, outline issues remaining for discovery and trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer or in preparing for additional remands and transfers.

Respondents' Appendix 1a-2a (footnote omitted).

Order No. 30 was thus an order listing and summarizing earlier orders issued by the District Court acting in its capacity as the MDL 926 Transferee Court under 28 U.S.C. § 1407 to determine all matters and motions, including discovery and potentially dispositive motions, arising during the MDL 926 pretrial proceedings. Order No. 30 was hence within the scope of the MDL court's pretrial authority as determined by this Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997) and respects the *Lexecon* delineation between transferee and transferor court functions.[1]

---

1. Although Order No. 30 itself did not terminate any of the cases before it, it is well established that 28 U.S.C. § 1407 empowers the MDL transferee court to enter dispositive orders terminating the case. The transferee court exercises pretrial subject matter and personal jurisdiction to the same extent as would the transferor courts. *Lexecon*; *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357, 367-68 (3rd Cir.), *cert. denied, sub nom Gollomp v. Trump*, 510 U.S. 1178 (1994); *In re Telectronics Pacing Systems,* (Cont'd)

Order No. 30 is not, by its terms, content, or context, a new or final judgment on any issue, nor a disposition on the merits of any case.[2] Order No. 30 attaches a list of the District Court's numbered pretrial orders and other items, such as the Master Complaint and Master Answers. It was intended and serves as a ready guide to the transferor courts of events and decisions made in MDL 926, to prevent inconsistent rulings, relitigation of issues and duplication of effort in connection with such interlocutory matters by the transferor courts.[3] Order No. 30 was nothing more nor less than the District Court's summary of its pretrial rulings under 28 U.S.C. § 1407, leaving matters of trial and final resolution for the transferor courts. *Lexecon*, 523 U.S.

(Cont'd)

Inc., 953 F. Supp. 909 (S.D. Ohio 1997); *Manual for Complex Litigation, Third*, § 31.131. It is well established that the pretrial orders of the transferee courts, such as those chronicled and attached to Order No. 30, are essentially binding on the transferor courts. *Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341 (7th Cir.), *cert. denied*, 404 U.S. 1001 (1971); *Manual for Complex Litigation, Third*, § 31.132. ("Although the transfer court has the power to vacate or modify rulings made by the transferee court, subject to comity and "law of the case" considerations, doing so in the absence of a significant change of circumstances would frustrate the purpose of centralized pretrial proceedings.")

2. As, stated therein, the court entered Order No. 30 "under the authority of Fed. R. Civ. P. 16" and its "abbreviated discriptions" of earlier orders "should not be understood as modifying the basis on which such orders were entered." Respondents' Appendix 1a.

3. *The Manual for Complex Litigation, Third* advises:

> The complete pretrial record is sent to the transferor court upon remand of the case. One of the final actions of the transferee court should be entry of a pretrial order that fully chronicles the proceedings, summarizes the ruling that will affect further proceedings, outlines the issues remaining for discovery and trial, and indicates the nature and expected duration of further pretrial proceedings; transferee courts are not expected to provide transferor courts with status reports during the pretrial proceedings. This order will assist the transferor courts in planning further proceedings and trial.

§ 31.133 *Remand.*

26.[4] Petitioners had not timely taken appeal, or sought certification for interlocutory review under 28 U.S.C. § 1292(b), of any of these rulings, including the 6% assessment orders.

Petitioners seek, throughout their brief, to mischaracterize the sole basis of the District Court's jurisdiction as arising from its certification of a settlement class, and the sole beneficiaries of the common benefit assessment as "class counsel." In fact, the common benefit work was performed primarily by the seventeen-member court-appointed Plaintiffs' Steering Committee (PSC) (some, but not all of whom served as "class counsel"), and the scores of additional plaintiffs' counsel whose common efforts the PSC has coordinated for over seven years, to benefit all breast implant litigants, without regard to class status. Order No. 13 established the common benefit assessment prior to the certification of a settlement class or the implementation of the settlement program, in the early stages of the litigation, to prevent unjust enrichment by litigant-beneficiaries of the common discovery and pretrial effort then underway. By its terms, Order No. 13 was not limited to Class Counsel or the PSC, but established a uniform minimal assessment to compensate and reimburse *all* "attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients." Order No. 13, ¶ 3(a). Petitioners' counsel have not performed any common benefit work for which reimbursement is claimed.

The single provision of Order No. 30 that was the subject of the Petitioners' appeal, ¶ 8, recites prior rulings by the court, made in Orders Nos. 13 and 27, regarding a uniform 6% common benefit assessment on all settlements of breast implant claims by persons

---

4. A remand order for further proceedings is not a final judgment within the meaning of § 1291. *Pauls v. Secretary of Air Force*, 457 F.2d 294 (1st Cir. 1972); *Eluska v. Andrus*, 587 F.2d 996 (9th Cir. 1978). "Neither a remand order nor a denial of summary judgment is ordinarily final and appealable under § 1291," even if, at a party's request, it is incorporated into a "judgment." In order to conclude that such a "judgment" was final, it must be "equivalent to an order of dismissal." *Id.* at 999. Order No. 30 is neither styled nor purports to be a "judgment," an order of dismissal, or any other final disposition.

over whom the court had exercised jurisdiction, including those, like Petitioners Carol Ingle and Barbara Brennan, whose individual actions were coordinated in the MDL proceeding, and those, like the other petitioners, who were before the Court for purposes of the revised settlement offer as members of the certified *Lindsey* class and who had not exercised their initial right to opt out of that class. Order No. 30 did not make any new ruling, nor did it extend any previous ruling, with respect to the assessment of 6% on settlements for deposit into the Common Benefit Fund to defray the expenses of the common discovery and pretrial effort conducted by the MDL 926 Plaintiffs' Steering Committee and other plaintiffs' counsel for the benefit of all MDL 926 participants, including Petitioners. Comparison of the provisions of ¶ 8 of Order No. 30 with Orders Nos. 27 and 13 demonstrates that Order No. 30 makes no new or different ruling that would allow an appeal therefrom on the issue of the 6% common benefit assessment.

Under the common benefit doctrine long recognized by this Court, the District Court possessed and exercised its inherent authority and equity jurisdiction to enforce the common benefit obligations it first articulated in Order No. 13 upon the beneficiaries identified and defined in Orders Nos. 13 and 27 (including the Petitioners as named plaintiffs and/or class members in the MDL 926 proceedings), from which Petitioners took no timely appeal.

The *Lindsey* class action to which Petitioners belonged was filed in the Northern District of Alabama in March 1994 as a component of the Silicone Gel Breast Implant Product Liability Litigation pending before the District Court, and was subject to Order No. 13, as were petitioners Ingle's and Brennan's own individual actions which became a part of MDL 926 in 1993. Order No. 13 provided that:

> All plaintiffs and their attorneys who, after this date, either agree — for a monetary consideration – to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief . . . with respect to a breast implant claim are hereby assessed

> . . . 6% of the gross monetary recovery. . . . This obligation [applies] to all cases now pending, or later filed in, transferred to, or removed to, this court and treated as part of the coordinated proceeding known as the Silicone Gel Breast Implant Products Liability Litigation. . . .[5]

Petitioners suggest that their later election to opt out of the Revised Settlement Program after availing themselves of the Program's claims evaluation procedure (an option that itself was not a requirement of due process or Rule 23, but was negotiated as an added benefit to claimants in the Program) somehow divested the District Court of its common benefit jurisdiction and Petitioners of their common benefit obligations, because the common benefit doctrine extends only to members of formal Rule 23 classes during their period of class membership, or to MDL participants during the pretrial transferee phase. Both premises are incorrect.

Under this Court's common benefit doctrine, when Petitioners finally left the class, by sufferance of a unique settlement feature that provided a third opt-out, their equitable obligations followed them.[6]

---

5. Order No. 27 provides that: *Order No. 13 continues in place, and will continue to govern the resolution*, whether by trial or settlement, of breast-implant claims of persons who do not accept. . . . the revised settlement, but who [] were members of the Lindsey class (and did not exercise their initial right to opt out). . . . What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund. Notice attached to Order No. 27, ¶ 28 (emphasis added).

6. Order No. 13 assessed 6% out of claimants' "gross monetary recovery." Order No. 27 (Approval of Revised Settlement Program and Injunction) provided that settling defendants would pay the 6% on behalf of participating claimants, a feature designed to make this voluntary settlement program attractive to claimants. Petitioners participated in the claims evaluation process of the settlement, utilized the Claims Office facilities, and then elected to opt out, on notice, via Order No. 27, that they would thereafter by governed by the original Order No. 13 assent provision. Petitioners suggest this is unfair treatment; in fact it constitutes a free and informed election on their part to

(Cont'd)

Trustees v. Greenough, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

Petitioners' arguments are further premised on the disingenuous suggestion that Petitioners are "state court" litigants whose only connection to MDL 926 was their membership, for over one year, in the certified *Lindsey* class.[7] While such membership, in and of itself, would have been more than sufficient to subject Petitioners to the jurisdiction of the Court and to the 6% common benefit assessment under this Court's common benefit doctrine, factually the connection of petitioners with the federal MDL proceedings was even more direct and long-standing. Petitioners did not exercise their initial *Lindsey* opt-out right in 1994. They remained in the *Lindsey* class, they registered for the *Lindsey* settlement, and they submitted a claim to the court-designated MDL Claims Administrator. They did not exercise their *second* opportunity to opt out when the Revised Settlement Program was announced in December 1995; rather, they submitted proof of manufacturer information to the Claims Administrator in order to pursue their Revised Settlement claim. Petitioners opted out only *after* receiving their Notification of Status letters, which was their third and final opportunity to opt out.

Regardless of their ultimate election with respect to the Revised Settlement Program offers, petitioners benefitted directly from the MDL 926 conduct of coordinated discovery, document collection,

---

(Cont'd)
forego the guaranteed benefits of the Revised Settlement Program (including settling defendants' subsidy of the 6% obligation for the prospect of negotiating their own settlements. Order No. 13, from its inception, applied to such independent settlements.

7. As noted above, the lead petitioner, Carol Ingle, was a named plaintiff in her own MDL action predating Order No. 13; her co-petitioners sought formal MDL party status as intervenors in *Lindsey* and were granted intervention in the *Ingle* case. Although activities in state courts would not remove Petitioners from the ambit of Order Nos. 13 and 27, respondents are unaware of any actual or substantial litigation by Petitioners in state courts.

analysis and imaging, and depositions; from the support, assistance and expertise provided by PSC members to plaintiffs' trial teams around the country; and from extensive legal research, briefing, and rulings on common issues. Order No. 30 itself details the results of these efforts, and its scope attests to the comprehensive nature of this common benefit work. These efforts enabled petitioners' claims to become "trial ready," and thus gave them settlement value they would otherwise not possess, without the necessity of substantial individual pretrial effort — effort petitioners' own counsel was not required to undertake, and did not perform.

Moreover, Petitioners used the MDL settlement class, program and infrastructure (including the Claims Office) established and maintained at considerable expense in the MDL proceedings to toll their statutes of limitations and to prepare and evaluate their claims for settlement.

Petitioners seek to enlist this Court to disregard its settled common benefit doctrine, in aid of Petitioners' efforts to avoid their equitable obligations to contribute to the costs of the common efforts that redounded to their benefit as participants in the settlement program and recipients of the work product of the MDL 926 multi-district pretrial proceedings.[8]

---

8. Among the benefits the MDL 926 Plaintiffs' Steering Committee's records show petitioners' counsel requested and received from the PSC for use in preparing their claims for settlement or trial, were 14 volumes of Bristol trial exhibits, five trial notebooks, two volumes of issues and abstracts, and two diskettes; five volumes of Baxter trial notebooks; access to transcripts of the depositions taken in MDL 926, the related California coordinated proceedings, and the related Harris County, Texas, proceedings; and video depositions. Earlier in the MDL proceedings, petitioners' counsel requested and received, *inter alia*, the World of Warnings Chart Book, CDS containing thousands of Dow Corning and Baxter documents; the PSC's Subjective Index to documents and the revised/updated March 1994 version of *Silicone Breast Implant Industry: Historical Chronology to the Documents Produced in MDL 926*. These are not mere compilations of documents and deposition transcripts otherwise available: these materials represent the ongoing work product of five years of active MDL proceedings, were supplied at no charge or nominal cost, and could not be replicated without millions of dollars worth of out-of-

(Cont'd)

Petitioners' selective account of the District Court proceedings and their own role therein misstates and omits relevant facts upon which this matter turns. Petitioners are neither state court litigants beyond the reach of the District Court's orders, nor "mere" class members in *Lindsey*: they are named and/or formally joined parties in actions included among those coordinated in MDL 926. Petitioners have no procedural grounds or substantive basis for redress from this Court. To the best of respondents' knowledge, Petitioners are *not* active litigants in federal or state court: they have settled their claims against defendants. No active breast implant litigants are challenging the assessment orders.

There has been no violation of Petitioners' substantive, procedural or due process rights. Petitioners present no equitable argument that could trump the application of the common benefit doctrine to this case. Petitioners assert nothing more than a right to unjust enrichment at the expense of other litigants and counsel. No new statute, unprecedented ruling, or novel policy is at issue. Rather, Petitioners would reverse generations of Supreme Court jurisprudence in a self-serving and ephemeral cause. The 6% common benefit assessment is a paradigm of the common benefit doctrine as articulated, refined and clarified by this Court in a series of decisions that spans over one hundred years. There is no conflict among the federal circuits, or between any of them and this Court, on the District Courts' authority to issue and enforce common benefit orders to fairly apportion case costs incurred at the pretrial stage among all beneficiaries who ultimately obtain recoveries, or on the specific exercise of this power by MDL transferee courts.

(Cont'd)
pocket expenses and attorney, paralegal, and expert time. The 6% common benefit assessment enabled the petitioners and all other breast implant recipients to receive such invaluable information, documentation, and analysis without either the investment of substantial time and effort by their own attorneys, or the payment of substantial costs up front. The common benefit work that the 6% assessment made possible constitutes a substantial savings, in time, money, and effort, that directly benefits petitioners and their attorneys. To date, the District Court has not determined what amount will ultimately be paid to the common benefit attorneys. Under Order No. 13, ¶ 3.(d), any excess will be returned proportionately to the contributors.

REASONS FOR DENYING THE WRIT

Over one century ago, before the enactment of 28 U.S.C. § 1407, and prior to the era of the modern class action under the 1966 amendments to Rule 23, this Court made manifest the federal trial courts' equity jurisdiction to reach beyond the confines of formal joinder and case captions to ensure that all who were the beneficiaries of efforts undertaken for the common good would contribute proportionately to reimburse those services. *Trustees v. Greenough*, 105 U.S. 527 (1881). In essence, the common benefit doctrine acknowledges "the original authority" of the District Courts "to do equity in a particular situation" to prevent unjust enrichment. *Sprague v. Ticonic National Bank*, 307 U.S. at 166. The PSC conducted common discovery and liability analyses for the benefit of others, like Petitioners and their counsel, who avoided the time and expense of replicating this discovery for their own cases. As this Court has observed,

> [t]o allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiffs' expense.

Mills, 396 U.S. at 392.

The 6% assessment with which Petitioners take issue reflects far *less* than it would cost to reproduce the common efforts, which included the review and analyses of millions of documents and scores of major depositions, for use in a particular case. The 6% common benefit assessment was hence neither novel, arbitrary, nor excessive. Under the common benefit doctrine, MDL transferee courts have imposed fee assessments substantially larger than the modest 6% assessment Petitioners seek to avoid. *See In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987) (7% assessment); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977) (8% assessment).[9]

---

9. This pre-split Fifth Circuit decision was binding on the courts below and expresses the prevailing law on MDL assessments.

The *Air Crash Disaster* decision recognized, 22 years ago, the necessity of common benefit assessment orders by transferee courts in multidistrict litigation, and affirmed an 8% cost assessment on all prospective recoveries, to be taken, as in Order No. 13, from the individual lawyers' fees. 549 F.2d at 1011. Although the *Air Crash Disaster* multidistrict litigation was far less complex than MDL 926, the principles the court of appeal articulated for use by transferee courts still stand: that where attorneys, such as the Plaintiffs Steering Committee and others herein, perform "duties beyond their responsibilities to their own clients," assessment of prospective recoveries is "a necessary incident to the goals of multidistrict litigation." *Id.*

This Court's *Lexecon* decision reconfirms the federal jurisprudence and legislative history reflected in the *Manual for Complex Litigation, Third*'s procedures for transferee court case management, §§ 31, *et seq.*, and summarized in Judge Weigel's definitive work, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578-83 (1978),

> [t]he transferee judge assigned to multidistrict litigation possesses all pre-trial powers over the transferred actions exercisable by a District Court under the Federal Rules of Civil Procedure . . . the transferee judge has authority to decide all pre-trial motions, including motions that may be dispositive, such as motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, [and] for summary judgment.

Thus, the rulings made by the transferee court may, and frequently do, affect the existence, value, prospects and ultimate fate of a litigant's claim or defense long after the multidistrict phase has itself been completed. One such ruling is the common benefit assessment MDL transferee courts may issue to prevent unjust enrichment by litigants, whether individual claimants, as in *Air Crash Disaster*, or class members, as in *Agent Orange*, *infra*, whose claims or cases utilize common benefit work. *Manual for Complex Litigation, Third*, § 20.223; *Air Crash Disaster*, 549 F.2d at 1016.

The *Air Crash Disaster* case affirmed the propriety of assessments by an MDL transferee court against litigants who were never part of a class and who proceeded to settle their claims separately. The specific right of an MDL transferee court to enforce common benefit obligations against the ultimate recoveries of class members after they opt out has likewise been definitively established by the Circuit courts. In *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296 (E.D.N.Y. 1985), modified on other grounds, 818 F.2d 226 (2d Cir. 1987), the Second Circuit recognized that class members who opt out of a class and use MDL work product (as Petitioners did here) can be assessed fees:

> A problem related to the issue of how a fee award affects those class members represented by their own private attorneys concerns those putative class members who opted out of the class. If they use the product of the class representatives' discovery efforts in the subsequent prosecution of their individual opt-out lawsuits, the question arises of whether they should be charged with some of the class's costs of discovery. This issue is particularly important in multidistrict litigations in which attorneys representing individual clients share in the benefits of joint putative class members who opt-out and use MDL discovery materials could be assessed a reasonable fee, to be paid back into the fund as their fair share of the legal expenses assumed by the class. *Cf., e.g., In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977) (requiring those who benefit from lead counsel's work to consolidated litigation to bear a portion of the fee award and reducing their contingent fee liability to their non participating attorneys accordingly); *Doherty v. Bress*, 262 F.2d 20, 22 (D.C. Cir. 1958) (requiring inactive counsel to contribute from his fee receipts), *cert. denied*, 359 U.S. 934, 79 S. Ct. 649, 3 L. Ed. 2d 636 (1969); *Heart Valve Cases*, MDL No. 367 (E.D.N.Y. 1983) (orders charging individual attorneys with costs of joint discovery).

Id. at 1317. Accordingly, in *Agent Orange*, the Second Circuit upheld the District Court's common benefit assessment on opt-outs. 818 F.2d at 239.

The *Manual for Complex Litigation, Third* (Federal Judicial Center 1995) similarly restates the courts' authority to order common benefit reimbursement and advises that the MDL transferee judge should supervise the payment of attorneys' fees and expenses to assure that counsel new to the scene or third parties who pursue their claims elsewhere do not ride the coattails of the parties who have performed the litigation tasks. The *Manual* provides:

> Expenses incurred and fees earned by designated counsel[10] action in that capacity should not be borne solely by their clients, but rather shared equitably by all benefitting from their services. If possible, the terms and procedures for payment should be established by agreement among counsel, but subject to judicial approval and control. *Whether or not agreement is reached, the judge has the authority to order reimbursement and compensation and the obligation to ensure that the amounts are reasonable.*

Manual at § 20.223 at p. 29 (emphasis added); *see also Smiley v. Sincoff*, 958 F.2d 498 (2d Cir. 1992) (transferee judge has authority to assess all counsel for work performed by committee members). *Kopet v. Esquire Realty Company*, 523 F.2d 1005, 1008-09 (2d Cir. 1975).

Petitioners would have this Court impose upon the court of appeal a duty to entertain arguments that depend, for their success, on the obliteration of controlling Supreme Court and appellate precedent, without offering any but a transient, self-serving rationale for the destruction of a venerable equitable doctrine.

---

10. "Designated counsel" refers in the *Manual* to counsel and committees, such as the PSC and class counsel in MDL 926 appointed by the court, to perform specific common benefit functions. *See Manual*, §§ 20.2, *et seq.* Petitioners did not object to the appointment of the PSC or class counsel, or to their performance of the common benefit work from which payment they now seek exemption.

Petitioners cite only one decision involving an MDL court, *In re Showa Denko K.K. L-Tryptophan Products Litigation*, 953 F.2d 162 (4th Cir. 1992),[11] in support of their petition. *Showa Denko* is inapposite, procedurally and substantively, to MDL 926. In *Showa Denko*, no class was certified, and the order at issue sought to assess payments from parties to other proceedings, including state court proceedings: Unlike the MDL 926 assessment orders, it thus sought to affect the rights of those who were never before the court. Petitioners here were at all relevant times voluntarily within the MDL court's jurisdiction and the ambit of its orders. Order No. 13 was a proper exercise of the court's jurisdiction over the parties to the MDL proceedings, and Order No. 27 extended the exercise of this jurisdiction to the members of the nationwide *Lindsey* class (including petitioners) that the court had certified as a component of its MDL proceedings.

Appellants argue that Order No. 30 is a final decision of the District Court under the "collateral order" doctrine, thus giving this Court jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978), articulate the test to be used in determining whether a decision comes within the "small class" of decisions considered to be appealable under the "collateral order doctrine." To be appealable: (1) the order must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the action; and (3) it must be effectively unreviewable on appeal from a final judgment. *Id.*[12]

---

11. An additional infirmity — requiring a substantial up-front payment from counsel, *before* cases were resolved, to gain access to work product — undercut the *Showa Denko* order. Moreover, the *Showa Denko* court "concluded its order with the certification required for immediate appeal pursuant to 28 U.S.C. § 1292(b)." 953 F.2d at 164. Here there was no request for grant of interlocutory appeal from Orders Nos. 13 or 27. Despite these deficiencies, petitioners' counsel of record herein were among those seeking to *uphold* the *Showa Denko* trial court's assessment order on appeal. 953 F.2d at 163-64.

12. In rejecting the appealability of orders denying class treatment, (Cont'd)

Order No. 30 flunks the "collateral order" test because it does not conclusively determine a disputed question. While petitioners claim that Order No. 30 modifies Order No. 27, and therefore conclusively determines the extent of the 6% assessment imposed by Order Nos. 13 and 27, Order No. 30 refutes this argument by its own terms. As Order No. 30 recites, it was entered to "*chronicle* the proceedings, *summarize* significant rulings, [and] outline issues remaining for discovery and trial . . . ." Order No. 30, p. 1 (emphasis added). The Order goes on to caution that the "abbreviated descriptions should not be understood as modifying the basis on which such orders were entered." *Id.* Furthermore, Order No. 30 specifically states that its terms "do not affect the terms of [the] revised settlement program [approved by Order No. 27]." Order No. 30, p. 2. Paragraph 8 of Order No. 30 from which Ingle, et al. moved appeal, correctly "summarizes" the scope of the assessment imposed by Order Nos. 13 and 27.

The common benefit costs assessment at issue, made early in the MDL 926 litigation and not timely challenged by Petitioners, promotes the well-settled common benefit doctrine established for over one hundred years by this Court in *Trustees v. Greenough* and reflected in numerous federal district and appellate decisions approving and affirming such assessments. This Court's common benefit precedents leave no doubt that the District Court's common benefit assessment orders were procedurally proper and substantively appropriate exercises of its equity jurisdiction over Petitioners. There is no conflict among the circuits, or between any circuit and this Court on the point. Acceptance of Petitioners' unfounded argument

---

(Cont'd)

Coopers noted that despite the purported severity of the district court's order, which rang the "death knell" for all plaintiffs' claims, the district court retained ongoing discretion to reconsider and amend its certification order under Fed. R. Civ. P. 23(c)(1). 437 U.S. at 469. Here, Order No. 13 provides for more meaningful ongoing reconsideration of the nominal assessment obligation, in ¶ 2.(f): "Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances." Petitioners made no such application for relief to the district court. Their circumstances are exceptional only in that they alone, out of thousands of beneficiaries, are determined not to pay their fair share of the common benefit expense.

that the administrative compilation order from which their appeal was attempted satisfies the strict collateral order exception criteria of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), would promote no important or compelling legal, equitable, or social goal. It would merely propel Petitioners on an exercise of ultimate futility: their attempt to undo the important and well-established common benefit doctrine — a doctrine that has served well the legitimate interests of Petitioners and thousands of other breast implant claimants, for the unfair economic advantage of a few.

In *Trustees v. Greenough*, 107 U.S. 527 (1881), this Court established the common benefit doctrine, under which those whose efforts create a common fund for an identifiable class are entitled to recover their fees and costs from all beneficiaries. This doctrine was further articulated and applied in a series of decisions including *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague v. Ticonic*, 307 U.S. at 161; *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970); *Boeing v. Van Gemert*, 444 U.S. 472 (1980); and *Blum v. Stenson*, 465 U.S. 886 (1984). As Justice Frankfurter stated in *Sprague*,

> That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.
>
> Whether one sues representatively or formally makes a fund available for others may, of course, be relevant circumstances in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities

> of the litigation — the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree — hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. 307 U.S. at 166.

Petitioners and their counsel were active throughout the course of the MDL 926 proceedings. They were on notice of the 6% common benefit assessment imposed in 1993 by Order No. 13. Neither they, nor any other MDL participant or beneficiary challenged or appealed from the common benefit assessment at that time. A later order, Order No. 27, entered on December 22, 1995 made it clear that the common benefit assessment applied to all claimants who benefitted from the MDL 926 efforts, including those who exercised the opt-out opportunity granted by the MDL court. Order No. 30 (Pretrial and Revised Case Management Order), entered nearly three years after the common benefit assessment of Order No. 13, and four months after the update and clarification of Order No. 27, was issued for the benefit of transferor courts on remand to

> chronicle the [MDL 926] proceedings, summarize significant rulings, outline issues remaining for discovery and trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer, or in preparing for additional remands and transfers.

By its own terms, Order No. 30 does not, and cannot, constitute a final, appealable order on the common benefit assessment issue. Neither its clear language nor its procedural context provide any support for any of the three common *Cohen* factors that must conjunctively be satisfied to permit an appeal to the court below, or review by this Court.

Just as the establishment of this Court's common benefit doctrine predated the modern class action and the multi-district statute, by many decades, the District Court's common benefit assessment predated class certification, and extended to the efforts of the scores of plaintiffs' attorneys (most of whom did not seek to be and were

not appointed as class counsel) whose efforts benefitted all claimants.[13] In so doing, the District Court followed the well-established tradition of federal courts coordinated in multi-district proceedings, who have issued and enforced similar common benefit assessments without the presence of a formal class or the inclusion of the assessed beneficiaries therein. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987); *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994) "common fund and substantial benefit," at p. 51.

While the application of Orders Nos. 27 and 30 to Order No. 13 in the settlement class certification and settlement program contexts provides additional bases and authority for the common benefit assessment, nothing in any of those orders (and, more importantly, nothing in the common benefit doctrine itself) *limits* the application of such assessments to the non-opt-out members of a certified class.

---

13. It bears repeating that the application of the common benefit doctrine is not limited to class actions, to class members, or to named parties before the Court. As observed in *Awarding Attorneys' Fees and Managing Fee Litigation* (Fed. Jud. Center 1994) "Common Fund and Substantial Benefit" at p. 51:

> [a]lthough many common fund cases are class actions, . . . the doctrine is not limited to class actions (as noted above). This point was clarified and the common fund doctrine further expanded in *Sprague v. Ticonic* [307 U.S. 161 (1939)], which involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit had only indirectly established the rights of others, and had not created a fund, the [*Sprague*] Court held that fees were in order . . .

As *Ticonic* holds, Petitioners need not be members of a class nor obtain their recovery from a specific fund-in-court in order to be subject to the court's equity jurisdiction to prevent unjust enrichment by directing contributions "as much as justice requires."

In short, the District Court had subject matter jurisdiction and inherent power to issue its assessment orders under the common benefit doctrine, the District Court had personal jurisdiction to impose its 6% common benefit assessment on those, like Petitioners, who are parties to actions filed in or transferred to MDL 926 and/or members of the *Lindsey* certified class, and the Petitioners' self-serving strategic decision to request, receive, and utilize the fruits of the plaintiffs' common benefit efforts before embarking on the *ex post facto* challenge they have brought to this Court dooms their petition as jurisdictionally deficient and substantively without merit.

A final decision, for purposes of determining appealability, is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1949). Order No. 30 cannot meet this standard. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court recognized a limited exception for orders that do not meet these appealability requirements, provided they

> fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

To qualify for review under the *Cohen* collateral order doctrine, the case must thus present "a serious and unsettled question." *Id.* But the District Court's authority to assess Petitioners their share of the common benefit expenditures is well-settled. Over one hundred years ago, this Court in *Central Railroad and Banking Company of Georgia v. Pettus*, 113 U.S. 116 (1885), upheld the authority of an Alabama District Court to enforce a 5% assessment on creditors "who accept the fruit of the labors of complainants and their solicitors." *Id.* at 127-128. *Trustees*, *Pettus*, and *Sprague* make it clear that the District Court's authority to impose and enforce the 6% common benefit

assessment at issue both predates and extends beyond the bounds of the class actions and multidistrict proceedings.

> The foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970), quoting *Sprague*, 307 U.S. at 166, noting that this Court in *Sprague* upheld the District Court's power to grant such reimbursement from "others . . . not parties before the court" even though plaintiff "had sued only on her own behalf and not for a class. . . ." *Id.*

Other decisions applying *Cohen* demonstrate that the collateral order doctrine is reserved for those rare instances that "resolve an *important* issue completely separate from the merits of the action. . . ." *Coopers*, 437 U.S. at 468 (emphasis added). In *Coopers* itself, this Court determined that an order decertifying a plaintiff class, and purportedly connoting the "death knell," as a practical matter, of the plaintiffs' claims, did *not* meet *Cohen*'s "importance" criteria. Here, the Petitioners have settled, or will settle, their claims; the common benefit work for which they refuse to pay enhanced the trial-readiness of their claims and established their settlement value, but did not circumscribe their rights to settle or try these claims as they saw fit.

The irony of Petitioners' invocation of *Cohen* in this precedential context is palpable. In *Cohen*, this Court granted review to adjudicate and uphold the validity of a new state statute that protected defendants in derivative suits by providing them security and indemnity for their defense costs and fees in the event of an unsuccessful claim. 337 U.S. at 545. Here, Petitioners would have this Court turn the *Cohen* doctrine upside-down to undo a century of its own jurisprudence providing equitable security and indemnity for the costs and fees of those whose successful efforts create a common benefit.

This Court should have no interest in straining *Cohen*'s modest reach to relieve Petitioners from the common benefit obligations it

has established and re-affirmed, and that the district courts have faithfully implemented, through a century of precedent.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

ELIZABETH JOAN CABRASER
Counsel of Record
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

LESLIE J. BRYAN
DOFFERMYRE, SHIELDS, CANFIELD,
KNOWLES & DEVINE
1355 Peachtree St., Suite 1600
Atlanta, GA 30309
(404) 881-8900

Attorneys for Respondents MDL 926
Plaintiffs' Steering Committee

APPENDIX

APPENDIX A — ORDER NO. 30 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED MARCH 25, 1996 AND FILED MARCH 26, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

CASE NO. CV 92-P-10000-S

(This document applies to all cases)

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION (MDL-926)

ORDER No. 30
(Pretrial and Revised Case Management Order)

In view of the recent remand or transfer of a substantial number of breast implant cases, and in anticipation of further remands and transfers, this Court, in accordance with § 31.133 of the *Manual for Complex Litigation, Third*, and after consulting with and receiving suggestions from the parties,[1] is entering this Order to chronicle the proceedings, summarize significant rulings, outline issues remaining for discovery and

1. Although this order has been developed through a process of consultation and suggestions, it should not be viewed as an "agreed" order. The Court has entered this order under the authority of Fed. R. Civ. P. 16, and plaintiffs or defendants may disagree with some portions of the order, particularly with respect to the description of certain earlier orders. These abbreviated descriptions should not be understood as modifying the basis on which such orders were entered.

trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer or in preparing for additional remands and transfers.

This order supplements — and, in the event of inconsistency, supersedes — prior orders entered in CV92-P-10000-S (the master file for MDL 926), and applies to all breast implant cases that are now pending in or may later be filed in, removed to, or transferred to this Court. Upon remand of cases to other federal or state courts (or upon transfer to other federal courts under 28 U.S.C. § 1404 or § 1406), the terms of this order will continue to apply in such cases except to the extent modified, for good cause shown, by such courts.[2] This order should also be treated as a supplemental order in those cases that have been recently remanded or transferred.

1. **Summary of Proceedings.** On June 26, 1992, the Judicial Panel for Multidistrict Litigation ("JPMDL") transferred 78 federal breast implant cases to the Northern District of Alabama (the "transferee court") under 28 U.S.C. § 1407. *In re: Silicone Gel Breast Implants Products Liability Litigation (MDL 926)*, 793 F. Supp. 1098 (J.P.M.D.L. 1992). Since that original order, the JPMDL has entered more than eighty Conditional Transfer Orders or other transfer orders, resulting in transfer of approximately 20,000 cases to this court. Some cases transferred by the JPMDL had been initially filed in a federal district court (the "transferor court"); others

2. Although transferor courts have the power after remand, subject to comity and "law of the case" considerations, to modify or vacate rulings by the MDL transferee judge, this power should, as indicated in *MCL 3rd* § 31.133, be sparingly exercised.

had been removed to a transferor court from a state court.[3] A relatively small number of cases — less than 1,000 — have already, on the suggestion of this court, been remanded by the JPMDL back to transferor courts or have been remanded by this court to state courts or have been transferred by this court to other federal courts under 28 U.S.C. § 1404 or § 1406. Of the approximately 20,000 cases that remain pending in this court, many are ready, or nearing readiness, for remand to a transferor court or to a state court, or for a transfer to another federal court. For convenience, the term "Remand Court" will be used in this order to refer not only to a federal or state court to which a case may be remanded, but also to a federal court to which a case may be transferred under § 1404 or § 1406.

On September 1, 1994, a class settlement was approved under Fed. R. Civ. P. 23(b)(3), with opt-out rights, in the *Lindsey* case. However, because of the amount of claims that would potentially be approved under the criteria of that settlement and because of Dow Corning's bankruptcy proceedings, the Court on December 22, 1995, approved the dissemination of notification of new opt-out rights and of the terms of a revised settlement program affecting claims against certain of the defendants. Class members have been advised of their "opt-out" rights relating to this revised settlement program; but, unless and until they exercise such rights, they are precluded from instituting or pursuing claims against the companies and persons named as settling

---

3. Some additional cases initially were either filed in the Northern District of Alabama, removed to this court from Alabama state courts, or transferred directly to this court under 28 U.S.C. § 1404 from other federal courts without going through the JPMDL.

defendants or released parties under the global settlement agreement (or the revised settlement program). The terms of this order do not affect the terms of this revised settlement program.

As indicated in ¶ 6 below, further proceedings in many cases, as well as the institution of new litigation by others, have been barred in whole or in part either because of claims against the Mentor defendants, the Bioplasty defendants, or Dow Corning, or because the plaintiffs were participants in a class settlement. However, with the availability of new opt-out rights that commenced December 1, 1995, more pending cases will soon become ready for remand or transfer. Also, the Court expects that, after exercise of these new opt-out rights, there could be a substantial number of new cases filed in state and federal courts, many of which may be transferred to this court.

2. **Conferences**. This Court held its first conference in this litigation in July 1992. General status and pretrial conferences have been conducted approximately every two months, with numerous additional conferences held to consider special problems and motions. Major rulings resulting from these conferences have been incorporated into written orders. However, from time to time, there have been clarifications and directions from the Court during these conferences that are not embodied in written orders.[4]

3. **Case Management Orders.** The primary orders that have governed the pretrial management of MDL 926 are Order

4. All major conferences have been recorded by a court reporter, and these transcripts can be obtained through Liaison Counsel.

No. 1 (Initial Case Management Order), entered June 26, 1992; Order No. 5 (Revised Case Management Order), entered September 15, 1992; and Order No. 7, entered October 6, 1992. Some provisions of these orders — particularly those relating to the time for conducting and completing discovery — have been modified from time to time, and the Court has entered some additional case management orders relating to particular subjects, *e.g.*, Order No. 11 relating to scheduling and conducting depositions.

(a) **Representative Counsel.** The Court has appointed and assigned certain responsibilities to Liaison Counsel for Plaintiffs, to Liaison Counsel for Defendants, and to a 17-member Plaintiffs' Steering Committee ("PSC").

(b) **Master File.** All orders, pleadings, motions, and other documents (except when not of general application) have been docketed and filed in a Master File, CV92-P-10000-S under the style, "In re Silicone Gel Breast Implants Products Liability Litigation (MDL-926)." Orders and other documents so filed have been deemed as filed in each individual case to the extent applicable, but have not been separately docketed or physically filed in such individual case files except where there was a particular reason to do so.

(c) **Preservation of Evidence.** The parties have been directed by Orders No. 1 and 5 to preserve all documents and other research or exhibits potentially relevant to the subject matter of this litigation. From time to time, this court has entered clarifications and

addressed particular problems relating to preservation of evidence.

(d) **Service of Process.** At the Court's urging, the national defendants agreed to accept service of process in breast implant cases if a copy of the summons and complaint was sent by certified mail, return receipt requested, to the person or address shown in Exhibit B of Order No. 5. Such defendants' agreement to accept service of process applies to any case involving breast implant product liability claims filed in any federal district court or in any state court of general jurisdiction.

(e) **Master/Sample Complaints.**

(1) At the Court's direction, the PSC filed in CV92-P-10000-S a Master Complaint (the operative version is styled "Amended Master Complaint") containing allegations that would be suitable for incorporation by reference in individual cases, together with a sample complaint illustrating how allegations from the master complaint could be incorporated into an individual case. In many cases, there will be only a simplified complaint, adopting by reference allegations from the master complaint.

(2) Allegations of the Amended Master Complaint are *not* deemed automatically included in any particular case. However, to avoid possible problems with statutes of limitation or doctrines of repose, the Court ordered that a motion would

be deemed to be made and be pending in each case (effective upon the case being filed in, removed to, or transferred to this court) to amend the complaint to add any potentially applicable claims and theories from the master complaint not contained in the complaint actually filed in that case. If a plaintiff desires to add any such claims and theories, she should do so through a specific motion in her case filed within 60 days after any remand or transfer; otherwise this "deemed" motion should be treated as withdrawn.

(3) In some cases, amendments to complaints will have been made before remand or transfer, which refine and limit the theories on which the plaintiff will proceed at trial. In other cases, such amendments will be needed in the Remand Court before the case proceeds to trial.

(f) **Master Answers.** At the Court's direction, each of the national defendants has filed in CV92-P-10000-S a Master Answer, incorporating its defenses in law or in fact to claims made against it in the various actions. The answers do not attempt to provide a cross reference to particular paragraphs or counts of the various complaints. The answers do, in a "generic" manner, admit or deny the allegations typically included in claims, as well as make additional allegations as are appropriate to the various claims and defenses.

(1) These Master Answers have been deemed by court order as automatically made by those

defendants in each such case unless and until another answer is filed by that defendant, in which event the individually-filed answer (and not the Master Answer) should be treated as that defendant's response to the complaint.

(2) In some cases, amendments to answers will have been made before remand or transfer that conform to the requirements of Fed. R. Civ. P. 8. In other cases, such amendments may be needed in the Remand Court after the plaintiff's complaint has been refined and before proceeding to trial.

(g) **Additional Defendants.** The Court has typically granted plaintiffs leave to amend complaints to add defendants, without addressing whether or not these amendments would "relate back" or would be subject to a defense based on statutes of limitation or repose.

(1) In ruling on whether any such amendments are barred by statutes of limitation or repose, Remand Courts will need to determine when particular plaintiffs "opted out" of certain federal class actions, most particularly the *Dante* and *Lindsey* class actions. It should be noted that whether statutes of limitation and repose resume running 30 days or 6 months after a person opts out of the *Lindsey* class settlement will depend on when that opt-out right is exercised.

(2) In granting a plaintiff's motion to remand a case to state court (or to suggest to the JPMDL remand to a federal transferor court), this Court has generally required that the plaintiff indicate there are no further defendants to be added. While a Remand Court would have the power to allow addition of a defendant after remand or transfer, this power should be exercised sparingly and only for good cause shown.

(h) **Multiple Plaintiffs**. To consolidate filings and avoid unnecessary duplication and expense, plaintiffs were granted leave, without need for motion or order, to add other plaintiffs to any pending (or subsequently filed, removed, or transferred) case in this court if all plaintiffs in the case (1) were represented by the same counsel; (2) were suing the same defendants; and (3) were implanted in the same state. The result has been that in some cases there may be a large number of plaintiffs. Remand Courts will, after remand or transfer, need to consider in such cases the extent to which severance under Fed. R. Civ. P. 42 for further pretrial proceedings or for trial will be appropriate.

4. **Discovery**. The basic principles that have governed the conduct of discovery were set forth in ¶ 7(a) of Order No. 5, but are repeated here as an aid in understanding some of the details that follow: (1) discovery should be conducted on the assumption that there may be a separate trial of each case (federal or state); (2) additional "true discovery" will not be needed with respect to many potential witnesses who have previously testified in depositions or in trials; (3) video-

taped depositions (which are also stenographically recorded) should be taken for potential use as trial testimony of all persons whose testimony will likely be needed in a number of trials, thereby enabling trials to be conducted in different courts at the same time without complications arising from unavailability of witnesses; (4) through use of a joint plaintiff-defendant federal-state library, all parties in any federal or state court should have quick and inexpensive access to, and the ability to retrieve, (A) all existing and future depositions, interrogatories, requests for admission, and trial transcripts in text-readable and searchable computer files and (B) all potentially relevant documents from the defendants and other sources that are likely to be used during depositions or at trial in more than a single case; (5) claims of confidentiality and use of "protective" orders restricting use of materials should be kept to an absolute minimum; (6) some discovery will be "national" in scope (*i.e.*, potentially needed in various cases throughout the country), while other discovery will be "regional" (*e.g.*, depositions from plastic surgeons performing numerous implants) and still other discovery will be "case-specific" (*e.g.*, depositions of plaintiffs and their treating or examining physicians); (7) the plan should be designed to accommodate coordinated, cost-efficient discovery in both federal and state courts; and (8), in order to minimize unnecessary burdens and expense of redundant discovery, parties should not submit document requests, interrogatories, requests for admission, and notices of depositions without first determining that the materials are not available in the library or are inadequate.

Appendix A

(a) **Documents.**

(1) **Joint Document Depository.** A national document depository, maintained at the joint expense of the PSC and the national defendants, is located in the federal courthouse in Cincinnati, Ohio. The depository houses documents, transcripts, videotapes, and other materials produced by the defendants and third-parties in the litigation. It is accessible to both federal and state court litigants, including counsel involved in related insurance coverage litigation, as well as to nonlitigants. Directed to produce "all potentially relevant documents," the national defendants have to date produced over nine million pages of documents. This document discovery, begun in mid-1992, is now, for all practical purposes, substantially complete, though there is continuing production of some currently-created documents and there are a few remaining disputes regarding production of particular documents, primarily relating to claims of privilege or work-product protection and certain on-going studies. With few exceptions, the documents in the depository can be viewed and copied by any interested person; relatively few documents are subject to any protective order restricting copying, use, or disclosure.

(A) **Racine Warehouse.** Bristol-Myers maintains a large warehouse of documents from the Medical Engineering defendants in Racine,

Wisconsin. The warehouse contains documents from a number of related companies and entities, including Natural Y Surgical Specialties, Aesthetech, Markham Medical, Surgitek, Medical Engineering, and related successor companies. The PSC reviewed the warehoused documents and selected a large number of documents to be sent to the Cincinnati document depository; these documents have been Bates-numbered, copied, and inventoried. There are thousands of additional documents in the Racine warehouse that are not in the Cincinnati depository; but it is unlikely that any litigant will need to review these documents.

(B) **Documents Obtained by Subpoena.** Also available in the depository are documents obtained by the PSC through subpoenas to third-parties, *e.g.*, the Food and Drug Administration, the American Society of Plastic & Reconstructive Surgeons, and the Health Industry Manufacturers Association. Given the documents produced to the depository by the FDA, there should be little reason for FOIA requests to the FDA.

(C) **Documents Produced at Depositions of Former Employees.** Certain former employees of defendants produced documents from their prior employment, pursuant to a subpoena duces tecum at their depositions. These documents have been maintained in the

depository and typically are identified by a letter prefix related to the witness's last name.

(D) **Other Written Discovery Materials.** In addition to the MDL document production, the PSC has obtained and submitted to the depository materials from other breast implant litigation, including state coordinated proceedings, such as the interrogatories and document production requests prepared by the California Plaintiffs' Steering Committee and the defendants' responses to such requests.

(E) **Trial Transcripts and Depositions.** Also available at the depository are copies of trial transcripts of breast implant trials in state and federal courts, as well as depositions taken in such cases that might be of general interest, *e.g.*, depositions of experts. Keeping these transcripts and depositions current is a joint responsibility of the PSC, individual plaintiffs, and the national defendants.

(2) **CD-ROM Disks.** Most documents produced to the depository by the defendants have been "imaged" and are available on CD-ROM disks, each of which contains approximately 15,000 pages of documents (approximately 7 to 8 banker's boxes). In a sense, these disks — approximately 200 at the present time — constitute a traveling document depository since hard copies can be printed from the disks and the parties have

stipulated that accurate printouts from these disks are to be treated as duplicates of the documents on file in the depository. It should be noted that not every document produced to the depository has been so imaged. In particular, some records that are likely to be very case-specific, such as Dow Corning lot-history records and pleadings, may not be on CD-ROM disks and may be available only at the Cincinnati depository.

(3) **Objective Indices and Catalogues.** At the Court's direction, the PSC has, at its expense, reviewed and coded documents produced to the Depository and prepared a computerized database that identifies by number and describes (in neutral words suitable for use by a court preparing a list of exhibits) the various documents produced to the Depository. (National defendants were provided an opportunity to indicate any disagreement as to the PSC's coding of this data.) This database captures such information as document Bates numbers; the apparent dates, authors, recipients, and carbon copies; a brief description of the document; and identifying information regarding its image on CD-ROM disks. It should be noted that, as with certain documents not imaged on CD-ROM disks, some case-specific data has not seen subjected to this review, coding, and computer data-entry by the PSC.

The PSC has also prepared a catalog of CD-ROMs, documents, and databases. This catalog

details documents produced, including a description, the CD-ROM disks, and a list of the work product databases. The PSC has also created an "MDL-926 Box Inventory: Master List of Boxes." This list may be the most definitive source as to what documents have been produced in this litigation and includes a list of boxes produced by the defendants, a list of boxes from the Racine production, a list of boxes produced by third-parties, and a list of documents produced at depositions of former employees.

(4) **Privilege and "Work Product" Logs.** In directing the defendants to produce all potentially relevant documents, the Court recognized that some documents would be privileged or protected by the "work product doctrine." In Orders No. 5 and 12, the defendants were directed to prepare and maintain a "privilege log," listing documents withheld, with sufficient identifying information to permit the parties to determine whether the claim of privilege or protection was appropriate. Although most disputes regarding claims of privilege or work product protection have been resolved by this court or by state courts, there remain some disputes that will be ruled on by the Court over the coming months. (The documents still in controversy are not believed to be sufficiently significant as to justify delay in completing case-specific discovery or in setting cases for trial.)

Appendix A

(A) In ruling on claims of privilege or work-product, this Court has looked to the state laws that would be most restrictive on such claims. The rationale for this approach is that, if a document would not be protected from disclosure under the laws of any state in which a party had been sued, then it would be ordered disclosed in cases from such jurisdiction, which in turn would moot arguments that the document might have been subject to protection under the laws of other states.

(B) From the outset of this litigation, it has been clear that cooperation among counsel and parties was essential for the orderly and expeditious completion of pretrial proceedings. Therefore, the Court has operated under the following general guidelines and urges the continuation of this practice upon remand or transfer: the communication, transmission, or dissemination of information among the Plaintiffs' counsel or among Defendants' counsel in the course of this litigation should not ordinarily be deemed a waiver of the attorney-client privilege, the protection afforded by the work product doctrine, the protections afforded to material prepared for litigation, or any other privilege to which a party may be entitled. Any cooperative efforts, as described above, should not be used against any of the parties, be cited as purported evidence of conspiracy, wrongful action or wrongful

conduct, or be communicated to the jury. However, the mere exchange of information or documents between counsel shall not in itself render such information or documents privileged. Nothing in this paragraph shall in any way affect the applicability of any privileges or protections against disclosure otherwise available under law.

(C) One of the major disputes related to a claim of attorney-client and work-product protection involving certain reports prepared for Dow Corning by Griffin Bell, Esq. This Court ruled that, for the most part, such documents were protected from disclosure under the laws of all states. Given Dow Corning's bankruptcy proceedings, any efforts to revisit this ruling would have to be addressed to the Bankruptcy Court in the Eastern District of Michigan.

(5) **Objections to Admissibility of Documents.** To be separately transmitted to each Remand Court is a stipulation, with voluminous appendices, that should substantially reduce the time spent during trial in providing foundation evidence affecting the admissibility of documents produced to the depository. In general, this stipulation serves both as an agreement to waive various possible objections to documents (such as "best evidence", authentication, and business-records requirements) as indicated in the appendices and as deposition answers under Fed.

R. Civ. P. 31 by defendants to questions affecting admissibility of the documents. Courts and litigants should review carefully the terms of the stipulation to determine its scope, effect, and limitations; the description of the stipulation in this order is not intended to modify or alter the terms of the stipulation, which were carefully worked out over a period of many months.

(A) It should be noted that the stipulation does not address, or attempt to preclude, objections under Federal Rules of Evidence 402 and 403, nor does it address when, during a trial, an otherwise admissible document should be received in evidence.

(B) It should also be noted that the stipulation does not preclude a Remand Court from imposing additional requirements, such as through further pretrial order or under local rules, relating to listing of documents and preserved objections in advance of trial.

(C) The stipulation, with appendices, will be provided to each Remand Court both in "hard copy" and on a computer-disk. Additionally, for convenient reference, a short-list will be prepared and provided that covers the documents most frequently offered at trial.

(b) **The MDL Depositions**. The basic principles governing the taking of depositions were set forth in

Appendix A

¶ 7(f) of Order No. 5 and in Order No. 11 (Deposition Guidelines), entered June 30, 1993.

(1) Hundreds of depositions have been conducted in accordance with these directives, and are available through the depository in hard copy, minuscript, ASCII disks, and videotape. There will be some additional depositions to be taken either by the PSC or the defendants, and, when taken, these will likewise be made available to all litigants.

(2) Under terms of these orders, particularly ¶ 7(f)(6) of Order No. 5 and ¶ 16 of Order No. 11, these depositions should be usable in all Remand Courts, federal and state.

(3) Substantial portions of these depositions have been used by plaintiffs or defendants in various trials in federal and state court that have taken place in the last two years. It can be expected that a major part of the evidence to be presented in future trials will consist of selected portions of these depositions in either videotape or written transcript form. To facilitate presentation of this evidence, Remand Courts should consider requiring the parties in particular cases nearing trial to designate and counter-designate portions of these depositions appropriate to such cases and, if video tape is to be used, to prepare an edited version for use at trial. It is likely that, as additional trials are held, some consensus will develop as to the

portions the parties will want to offer and thereby eliminate the need to repeat this designation and editing process in future trials.

(4) The parties were encouraged by the Court to take "trial-type" videotaped depositions of all persons whose generic testimony would likely be needed in many cases — both to reduce the burden on such persons and to reduce the potential that unavailability of such persons might prevent trial settings or cause continuances of trial. This Court recommends to Remand Courts that only in exceptional circumstances should trials not be scheduled or be continued based on the claimed unavailability of a "key" witness if a videotaped "trial type" deposition of that person, covering the subjects that would be presented at trial, has been taken or if the party should have anticipated the need to take such a deposition.

(c) **Remaining Discovery.** A relatively small amount of "national" discovery remains to be conducted or completed by the PSC or by the national defendants. This remaining national discovery — which is not sufficiently substantial to justify delay in remand or transfer of cases for further case-specific preparation and trial — will continue to be controlled by this Court and, when conducted, will be made available, as appropriate, to Remand Courts and litigants in such courts. The bulk of remaining discovery will be "plaintiff-specific" and may be conducted either while a case is pending in this Court or after it is remanded or

transferred to a Remand Court. The following provisions are intended to govern further discovery in this Court and — subject to a Remand Court's power to alter these provisions by order or rule — discovery in a Remand Court after such remand or transfer.

(1) **Additional Discovery from Defendants and their Employees.**

(A) Further depositions of the national defendants and their current and former employees by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant or with the approval of this Court (or, after remand or transfer, by a Remand Court). It is anticipated that such depositions will be limited to situations in which discovery of a particular issue is non-duplicative of prior discovery — typically being matters specific to an individual plaintiff — and that, absent a stipulation of the parties or court order for good cause shown, direct examination should be completed in 3 hours.

(B) A national defendant may, with the approval of this Court, preserve the testimony of any of its current or former employees whose health jeopardizes his or her ability to testify in multiple trials, or for other good cause. A national defendant may also, with the approval of this Court or a Remand Court, preserve the

testimony of any of its current or former employee for use in a specific trial.

(C) Further document production requests of a national defendant by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant, with the approval of this Court, or — with respect to plaintiff-specific documents — by a Remand Court after remand or transfer. Any such request must be accompanied by a showing that the requested documents are not available in the Cincinnati depository.

(D) Interrogatories to a national defendant under Fed. R. Civ. P. 33 or a state counterpart will, unless approved by this Court (or, after remand or transfer, by a Remand Court), be limited to questions relating to identification of experts, expected areas of expert testimony, theories of defense, or identification of trial witnesses or exhibits, where such inquiries have not previously been addressed by the defendant. Questions will not be permitted if the answers would require examination of documents that are available in the Cincinnati depository.

(2) **Discovery from Plaintiffs.**

(A) Implant-recipient plaintiffs and their spouses are required to complete and serve on Defendants' Liaison Counsel (within 60 days

after their case is filed in, removed to, or transferred to this Court) the approved MDL Questionnaire, which is treated as the plaintiff's answer to interrogatories and requests for production. This requirement is waived if such persons have provided substantially the same (or more extensive) information based on discovery requests in the court from which the case was transferred to or removed to this Court. Ordinarily, a case will not be remanded or transferred by this Court unless and until such information has been provided to the defendants.

(B) Defendants may, while a case is pending in this Court or after remand or transfer, conduct a deposition of a plaintiff (and, where applicable, the spouse), limited (unless extended by stipulation or court order) to a maximum of 6 hours of direct examination per person. Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the plaintiff, but must be limited to matters not previously covered or which have changed since the prior deposition.

(C) Defendants may, while a case is pending in this Court or after remand or transfer, depose a plaintiff's treating physicians, limited (unless extended by stipulation or court order) to a maximum of 3 hours per physician (or

6 hours if the physician provides any substantial testimony respecting issues of general or specific "causation"). Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the physician, but must be limited to matters not previously covered or which have changed since the prior deposition.

(D) A plaintiff may, while a case is pending in this Court or after remand or transfer, preserve her trial testimony pursuant to the provisions of the Order Governing Expedited Discovery and The Taking of A Videotaped Deposition for Preservation of Testimony for Trial, entered April 26, 1993.

(E) A plaintiff may also, while a case is pending in this Court or after remand or transfer, schedule a "trial-type" deposition of her treating physicians.

(3) **Discovery of Non-Parties.** Depositions of non-party witnesses who have not previously been deposed and who are not providing "expert" testimony will be permitted in this Court and in Remand Courts as authorized by the Fed. R. Civ. P. or state counterparts. Supplemental depositions of such persons who have previously been deposed will not be permitted, without approval of this Court (or, after remand or transfer, of the Remand Court), on subjects covered in such earlier depositions.

(4) "Expert" Testimony. By a separate order (but, when approved, to be attached as Appendix B to this Order), the Court is establishing provisions relating to further discovery from, perpetuation of testimony from, and pretrial designation of witnesses specially retained or employed by plaintiffs or defendants to provide "expert" testimony under FRE 702 or 703.

(d) **New Developments.** By motion in this Court or in a Remand Court, a party may, notwithstanding the above limitations on further discovery, request permission to seek additional discovery from any party or non-party concerning new or newly-discovered developments and information, including but not limited to new epidemiological, manufacturing, and medical developments, or new legal issues. The motion should set forth (i) the specific discovery being sought and (ii) the reasons why prior discovery could not have adequately developed or addressed the specific area. Any party opposing the discovery request shall move to quash or for a protective order within fourteen (14) days after being served with the discovering party's motion.

5. **Summary Judgment and Other Potentially Dispositive Issues.**

(a) Standard of Review. In ruling on summary judgment motions, this Court has followed the principles clarified in the trilogy of cases decided by the Supreme Court in 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317

(1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is proper if but only if, based on the admissible evidence that would be available and the applicable burdens of production and persuasion, a party would be entitled at trial to judgment as a matter of law because of material facts that either are not in substantial controversy or lack sufficient evidentiary support. Facts in genuine dispute have been assumed to be favorable to the party against whom summary judgment would be entered.

(b) **Choice of Law.** In federal multidistrict proceedings, a transferee court must apply the substantive law of the transferor courts. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F. Supp. 79, 81 (D.P.R. 1990) (quoting *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)). The transferor courts in diversity cases would be bound to apply the law of the forum state, including its choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *See also Manual for Complex Litigation, Third* § 33.254 (1995). This MDL proceeding involves diversity-jurisdiction cases filed in, or removed to, federal courts in 92 of the 94 districts, located in every state, the District of Columbia, Puerto Rico, and the Virgin Islands. This Court must therefore look to the laws of the several states to determine whether summary judgment is appropriate. In ruling on motions by defendants for summary judgment, this Court has based its decision on whether, under the substantive laws of each state, the movant would be entitled to such

judgment in a federal court. Denial of such a motion means only that this court has concluded that under the substantive laws of at least one such jurisdiction the movant would not be entitled to summary judgment.

(c) **Corning Incorporated.**[5] On April 25, 1995, the Court confirmed an earlier order granting summary judgment in favor of Corning Incorporated, concluding that under the substantive law of all states Corning was entitled under Fed. R. Civ. P. 56 to dismissal of breast implant claims against it. 887 F. Supp. 1463 (N.D. Ala. 1995). This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against Corning in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(d) **The Dow Chemical Company.**[6] On April 25, 1995, the Court vacated an earlier interlocutory order that had granted summary judgment in favor of The Dow

---

5. Corning has never manufactured or distributed breast implants or component parts or materials; it is and has been, however, a 50% stockholder of Dow Corning Corporation.

6. Like Corning, Dow Chemical has never itself manufactured or directly distributed breast implants or component parts of materials, but is and has been a 50% stockholder of Dow Corning Corporation. Dow Chemical has, however, been involved in research and testing of silicone products and provided Dow Corning with at least some of its findings and with some technical assistance.

Chemical Company. 887 F. Supp. 1463 (N.D. Ala. 1995). On December 26, 1995, the Court denied Dow Chemical's motion for reconsideration. The Court concluded that under the substantive laws of at least some states Dow Chemical was not entitled to summary judgment under Fed. R. Civ. P. 56 with respect to claims based on negligent undertaking, Restatement (Second) of Torts § 324A.[7] This remains an interlocutory order, and does not constitute a conclusion that Dow Chemical would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by Dow Chemical in many courts based on the substantive law of those jurisdictions, and it may well be that Dow Chemical will be entitled to judgment as a matter of law in some such jurisdictions.

(e) **Bristol-Myers Squibb Co.** On April 25, 1995, the Court denied a motion for summary judgment filed by Bristol-Myers Squibb Co. 887 F. Supp. 1447 (N.D. Ala. 1995). Bristol never itself manufactured or distributed breast implants, but was and is the sole shareholder of Medical Engineering Corporation, a major supplier of breast implants. The Court concluded

---

7. Because summary judgment could not be entered in favor of Dow Chemical on the negligent undertaking claim, the Court did not address plaintiffs' additional theories of direct liability, which included strict liability, corporate conspiracy, concert of action, aiding and abetting, fraud, and fraudulent concealment. The Court did, however, grant partial summary judgment in Dow Chemical's favor as to the "corporate control" and "alter ego" causes of action.

that under the substantive laws of most, if not all, states Bristol could be held subject to potential liability both on "corporate control" theories and on certain "direct liability" theories.[8]

(f) **Scotfoam.** On April 25, 1995, the Court granted a motion for summary judgment filed by Scotfoam Corporation and its related entities.[9] 887 F. Supp. 1463 (N.D. Ala. 1995). Scotfoam asserted that it was not liable for alleged injuries to breast implant recipients on the ground, inter alia, that, as a bulk supplier, it had no duty to provide warnings regarding polyurethane foam to breast implant recipients or their physicians. Scotfoam made polyurethane foam, some of which was sold to Wilshire Foam Company, which,

---

8. In denying summary judgment, the Court recognized that Bristol had likely been named as a defendant in some cases involving implants sold before its acquisition of MEC in 1982 or before it undertook to conduct and publicize tests relating to the safety of implants. It may also have been named as a defendant in some cases involving Natural Y and Aesthetech implants sold before acquisition of those companies in 1988. The extent, if any, of Bristol's potential liability in such cases will likely depend not only on questions of proximate causation but also on whether the particular jurisdiction imposes any post-sale duty to warn on manufacturers and suppliers of products. The Courts opinion did not attempt to resolve the special issues that may be presented in such cases; such issues may arise in particular cases after remand.

9. These companies include '21' International Holdings, Inc.; '21' Foam Company, Inc.; Knoll International Holdings, Inc.; General Felt Industries, Inc.; Foamex, L.P.; Foamex Products, Inc.; Recticel Foam Corporation; and Scott Paper Company.

in turn, after processing, was sold by Wilshire to several implant manufacturers. The Court concluded that no state would impose liability in a raw material supplier situation like the one that the Scotfoam facts presented. This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against the Scotfoam defendants in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(g) **Surgitek, Inc. and Cabot Medical Corp.** On August 9, 1995, in an unpublished opinion, the Court granted motions for summary judgment filed by Surgitek, Inc. and Cabot Medical Corporation. Plaintiffs had apparently sued them because Medical Engineering Corporation, a defendant in many of these cases, previously used the trade name Surgitek in marketing its implants. On March 12, 1992, pursuant to an Asset Purchase Agreement, Cabot purchased MEC's surgical stent and urological fiberoptic scope business, but not its breast implant business. Cabot also purchased the trade name Surgitek, and then formed a subsidiary named Surgitek, Inc. Neither Cabot nor Surgitek, Inc. was ever involved in manufacturing, designing, marketing, distributing, or selling silicone gel breast implant products or any component parts thereof. The Court's summary judgment order was certified as a final judgment under Rule 54(b), and no appeal was taken from this order. As a consequence, no breast implant

claim may be made against Surgitek or Cabot in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(h) **Federal Preemption.** In mid-1995, the Eleventh Circuit Court of Appeals issued an opinion applying the doctrine of federal preemption under the Medical Device Amendments of 1976, 21 U.S.C.A. §§ 360*c*-360*l*, in a case involving heart pacemakers. *See Lohr v. Medtronic, Inc.*, 56 F.3rd 1335 (11th Cir. 1995). The United States Supreme Court has granted *certiorari* in *Lohr*, and has scheduled oral arguments for later this Spring. The Supreme Court's decision could significantly affect all breast implant litigation, whether in federal or state court. This Court will not consider summary judgment motions based on federal preemption until that decision is issued. This Court, moreover, suggests that Remand Courts should probably defer further trials in breast-implant cases until that decision is issued.

(i) **Baxter Healthcare; Baxter International.** Baxter International, Inc. ("BII")[10] moved to be dismissed from thousands of cases for lack of personal

10. At the time of the November 1985 merger, the name of BII was Baxter Travenol Laboratories Incorporated; at early times, its name had been Don Baxter Intravenous Products Corporation and later Baxter Laboratories Incorporated. After the merger the name was changed to Baxter International, Inc., and for simplicity, the corporation has been known as BII.

jurisdiction. In its motion, BII, a publicly-owned holding company incorporated in Delaware, asserted that, unlike its wholly-owned subsidiary Baxter Healthcare Corporation ("Baxter Healthcare"), also a defendant in these cases, it is subject to personal jurisdiction in only a few states.[11] The Court concluded that, given the form of the corporate merger and reorganization involving American Hospital Supply Corporation, BII was subject to suit throughout the United States to the same extent as would be American Hospital, and on November 29, 1993, denied BII's motion. 837 F. Supp. 1123 (N.D. Ala. 1993). Although interlocutory, this ruling relating to personal jurisdiction is not likely to be contested or raised again in Remand Courts. The conclusions of the Court regarding the nature and consequences of the 1985 mergers also have the effect of rejecting the argument sometimes made by BII and Baxter Healthcare that they have no responsibility for claims against American Hospital (or Heyer-Schulte); if faced with a renewal of this argument, Remand Courts should be able to rely upon this Court's rejection of that position.

(j) **General Electric.** On March 20, 1996, the Court denied a motion for summary judgment filed by General Electric Company that was based on the "bulk supplier" and "learned intermediary" defenses. The Court concluded that there were sufficient factual differences from the Scotfoam defendants (see ¶ 5(f)

11. BII conceded that it is subject to jurisdiction in Delaware, Illinois, Kansas, Missouri, and the District of Columbia and did not contest jurisdiction in cases initially filed in those states.

above) that under the substantive laws of at least some states GE was not entitled to summary judgment under Fed. R. Civ. P. 56. This remains an interlocutory order, and does not constitute a conclusion that GE would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by GE in many courts based on the substantive law of those jurisdictions, and it may well be that GE will be entitled to judgment as a matter of law in some such jurisdictions.

(k) **Union Carbide.** There is presently pending in this Court a motion for partial summary judgment filed by Union Carbide Corporation based on the "bulk supplier" and "learned intermediary" defenses.

(l) **Koken's Motion to Dismiss.** Koken Co., Ltd. is a Japanese company that manufactured and sold a relatively small number of breast implants in the United States, either directly or through a distributorship agreement with Porex Technologies, Inc., a Georgia corporation. Koken moved to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, contending that it was not subject to personal jurisdiction anywhere in the United States and should therefore be dismissed from all actions and be relieved from further responsibilities to respond to discovery directed to it as a party. In denying this motion, the Court concluded that Koken was subject to personal jurisdiction for these product-liability claims, at least in Georgia which has a

broad long-arm statute and where the bulk of Koken's contacts with the United States had occurred. The Court has not yet ruled on Koken's motion for reconsideration. Cases against Koken will not be remanded or transferred until that motion is ruled upon; and, if Koken's motion is denied, there will be additional discovery needed from Koken before remand or transfer would be appropriate.

(m) ***Forum Non Conveniens.*** On April 25, 1995, the Court granted motions by the defendants to dismiss, on the ground of *forum non conveniens*, several breast implant cases brought by persons from Australia, England, and Canada who were not citizens or residents of the United States and who had received all their implants outside the United States.[12] 887 F. Supp. 1469

---

12. These dismissals were subject to certain conditions to which the defendants agreed:

(1) Each defendant will submit to the jurisdiction of, and accept service of process from, appropriate tribunals of Australia, Canada and England with respect to breast implant claims regarding implantations performed in those countries.

(2) Each defendant will, if so served, be bound to pay final judgments rendered against it by such tribunals relating to such claims.

(3) Each defendant will not, in raising any statute of limitations or similar defense in such tribunals, include the period that a suit, not barred by a statute of limitations in the United States, was pending against it in a court of the United States.

(Cont'd)

(N.D. Ala. 1995). This ruling, which was certified as a final judgment under Fed. R. Civ. P. 54(b), has been appealed to the 11th Circuit Court of Appeals, and that appeal is still pending. In that same order, the Court denied similar motions with respect to certain New Zealand citizens because of unusual circumstances that, for some New Zealanders, had the effect of not affording them any alternative judicial or administrative forum for the resolution of breast-implant claims. The Court has not yet ruled on any similar motions that may be filed in cases brought by persons from other countries.

6. **Special Circumstances Relating to Particular Defendants.**

(a) **Mentor Limited-Fund Class Settlement.** In September 1993 the Court, after extensive briefing, evidentiary submissions, notice, and a fairness hearing, approved a limited-fund mandatory non-optout class-action settlement under Fed.R.Civ.P. 23(b)(l)(B) with Mentor Corporation.[13] *See* 1993 WL 795477 (N.D. Ala.

(Cont'd)

(4) Each defendant will not object to evidence offered in such tribunals that, if offered in federal courts of the United States, would have been admissible against it.

13. The settlement provides for the payment by Mentor of approximately $25 million. The distribution formula for those benefits will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

1993). The order was certified as a final judgment under Fed. R. Civ. P. 54(b) and there was no appeal from this judgment. One consequence is to bar all further breast-implant claims, whether in federal or state court, against the Mentor defendants relating to implantations that occurred before June 1, 1993.

(b) Bioplasty Bankruptcy. As a result of bankruptcy reorganization proceedings in the District of Minnesota, all further breast-implant claims, whether in federal or state court, against the Bioplasty defendants are barred.[14]

(c) Dow Corning Bankruptcy. The bankruptcy reorganization proceedings involving Dow Corning Corporation, which have been pending in the Bankruptcy Court for the Eastern District of Michigan since May 15, 1995, significantly affect not only the institution and pursuit of claims against Dow Corning, but also further discovery from Dow Corning and its employees. Applications for relief from the automatic stay provisions or from other orders of the Bankruptcy Court should be made in that Court.

(d) "Settling Defendants". In general, institution and pursuit of claims against companies who are parties

---

14. The distribution formula for the approximately $5 million provided under Bioplasty's reorganization for implant claimants will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

to the Revised Settlement Program (see ¶ 1 above), as well as discovery from such companies, is precluded unless and until a plaintiff opts out from that settlement or from the earlier global settlement. Bristol, Baxter, 3M, McGhan, and Union Carbide may, at the present time, engage in settlement discussions with persons who opt out from this class settlement only on an individualized basis (*i.e.*, not as part of a settlement of a group of cases or claims) and, with respect to those who did not opt out of the earlier global settlement, only if the case is specifically set for trial or if the discussions take place under a court-sponsored mediation or arbitration program.

7. **Remand and Transfer of Cases.**

(a) **Procedures.** The first large group of cases suggested to the JPMDL for remand to federal transferor courts, resulting ultimately in the remand by the Panel of approximately 300 cases, occurred only after extensive pre-trial hearings and conferences, and consumed about 3 weeks of time by this Court and counsel. State remand orders (and the few orders that have transferred cases under 28 U.S.C. § 1404) have, to date, generally been based on motions, without individual conferences. Given the large number of cases that are ready — or may be nearing the stage — for remand or transfer, this Court is reserving its decision on the procedures that may most efficiently and economically be employed to consider potential remand or transfer. This Court does anticipate, however, that, whatever the procedures, a substantial number of cases

will, during the coming months, be remanded to state courts, be transferred to other federal courts, or be recommended to the JPMDL for remand to federal transferor courts.

(b) **Record on Remand.**

(1) The basic record in each constituent action or severed claim remanded or transferred to another court consists of the documents docketed and filed in the case file for that particular case, including the order from this Court or from the JPMDL remanding or transferring the case to the Remand Court.

(A) However, since the orders and other documents docketed and filed in the Master File, CV92-P-10000-S, are also, to the extent applicable (which in some cases will involve the adoption by reference of materials in that Master File), to be treated as docketed and filed in the individual cases, many documents in the Master File may also be needed as a part of individual case files. The most significant documents from the Master File (see Appendix A) will, therefore, be submitted to each Remand Court for inclusion, as court rules permit, either in a Master File in that court or in the individual case files as appropriate. Although not listed as part of the "record," the various documents produced to the depository in Cincinnati and the transcripts of the various MDL depositions

should be viewed as also produced in each of the constituent cases.

(B) Litigants in a particular case may conclude that, in addition to those documents from Master File designated by this Court as meriting inclusion in the record, there are other documents filed in MDL-926 that should be also so designated. As this Court's designation is intended merely to reduce the size of the record on remand and not to prejudice any substantive rights of a party, this Court will liberally honor requests by parties to include additional documents as part of the record on remand for particular cases.

(2) The documents from CV92-P-10000-S that are viewed by this Court as ones to be submitted to each Remand Court for potential inclusion in the record on remand are listed in Exhibit A to this Order.

(3) It is impractical to require the parties to enter into a stipulation governing the record on remand for each individual action in these consolidated proceedings. Accordingly, this Order constitutes the designation required under Rule 14(g) of the Rules of the JPMDL, but without prejudice to the rights of the parties to seek designation of additional documents for inclusion as part of the record on remand.

(c) **Further Proceedings and Actions Needed in Remand Courts.** A few cases may be ready for trial at the time of remand or transfer. For most cases, however, one or more of the following pretrial actions will be needed in the Remand Court before the cases are ready for trial:

(1) Potential refinement of the complaint and answer, including dismissal of unnecessary or inappropriately joined defendants.

(2) In multi-plaintiff complaints, consideration of the extent to which severance for further pretrial proceedings or trial is appropriate.

(3) Developing and implementing a plan for completion of discovery, including potential modification of the provisions of ¶ 4(d) of this Order. (Remaining discovery should primarily be plaintiff-specific, including discovery from plaintiff, from plaintiff's treating physicians, from any physician examining the plaintiff under Fed. R. Civ. P. 35 or its state counterpart, and from experts who will testify on issues of specific causation relating to the plaintiff's claims.)

(4) Consideration of motions for summary judgment based on the substantive law of the particular jurisdiction.

(5) Possible referral of case to mediation or arbitration, or other procedures to foster settlement.

(6) Setting of case for trial, which may include additional provisions relating to listing of witnesses and exhibits, the reduction of objections at trial, and procedures for considering (and reducing) motions in liming.

(d) **Suggestions for Conducting Further Proceedings in Remand Courts.** Remand Courts that can expect to have a significant number of breast-implant cases should consider, if they have not already done so, the following:

(1) Creating a master file in the court in which all motions and orders having general application, are docketed and filed, eliminating the need for multiple docketing and filing in individual cases files.

(2) Assignment of all breast-implant cases, at least for further pretrial proceedings in the court, to one judge. Depending on the number of cases, it may be necessary to reassign some cases to other judges for trial.

(3) Conducting one or more additional pretrial and status conferences, whether on a case-by-case basis or for all breast-implant cases in the court. State and federal judges having responsibilities for implant cases in the same jurisdiction should consider holding at least one joint conference in order to develop a coordinated plan of management.

(4) Establishing a realistic plan for completion of discovery and trial settings of individual cases. For cases in which relatively little plaintiff-specific discovery has been completed, a period of 6 months or more may be needed for this discovery. Each court will need to consider the appropriateness of using multiple trial settings or consolidating cases for trial.

(5) Controlling further discovery to reduce the burdens and conflicts that may be imposed on persons who are potential witnesses in many cases in many states. In particular, Remand Courts should require parties seeking generic discovery to demonstrate that the information sought is not available from other sources, such as the Depository in Cincinnati or the CD-ROM disks or through depositions previously taken.

8. **Common Benefit Fund.** Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 17, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right.

Appendix A

This the 25th day of March, 1996.

s/ Sam C. Pointer, Jr.
Sam C. Pointer, Jr.
United States District Judge

Appendix A: Documents from CV92-P-10000-S to be Transmitted to Remand Courts

Appendix B: Provisions relating to "Expert" Witnesses

Appendix A

APPENDIX A - DOCUMENTS FROM CV92-P-10000-S TO BE TRANSMITTED TO REMAND COURTS

Order No. 1	Initial Case Management Order; entered June 26, 1992
Order No. 2	Designation of Liaison Counsel; entered August 24, 1992
Order No. 3	Extension of Opt-Out period for *Dante* class; entered September 8, 1992
Order No. 5	Revised Case Management Order; entered September 15, 1992, but with most current versions of Exhibits B (Service List) and C (Plaintiffs' National Steering Committee)
Order No. 6	Requiring production of certain Baxter documents; entered September 25, 1992
Order No. 7	Modification/Clarification of Order No. 5; entered October 6, 1992
Order No. 8	Restrictions on direct communications by defendants with class members; entered October 16, 1992
Order	Modifying Order No. 8; entered November 9, 1992

Appendix A

Order No. 9	Modifying service lists, further modifying Order No. 8, and miscellaneous other matters; entered January 11, 1993
Master Complaint	Amended Master/Sample Complaint; filed May 3, 1993
Master Answers	(filed seriatum by national defendants)
Order	Governing Expedited Discovery and The Taking of A Videotape Deposition for Preservation of Testimony for Trial; entered April 22, 1993
Order No. 11	Deposition Guidelines; entered June 30, 1993
Order No. 13	Establishing Plaintiffs' Litigation Expense Fund; entered July 23, 1993
Order No. 14	Order Approving Mentor Settlement; entered September 10, 1993
Order	Denying Baxter's Motion to Dismiss; entered November 29, 1993
Order No. 19	Confidentiality of class membership information; entered June 7, 1994

Appendix A

Order	Opinion and Final Judgment Global Settlement; entered September 1, 1994
Order	Granting Corning, Inc. Summary Judgment; entered April 25, 1995
Order	Denying Dow Chemical Summary Judgment; entered April 25, 1995
Order	Denying Bristol-Myers Squibb Summary Judgment; entered April 25, 1995
Order	Granting Scotfoam Summary Judgment; entered April 25, 1995
Order	Granting certain *Forum Non Conveniens* motions; entered April 25, 1995
Order No. 24	Granting Surgitek, Inc. and Cabot Medical Corp.'s Summary Judgment; entered August 9, 1995
Order No. 25	Denying Koken's Motion to Dismiss; entered August 10, 1995
Order No. 26	Declaring Opt-out Rights and Procedures; entered October 10, 1995
Order No. 27	Approving Revised Settlement Program, with injunctions; entered December 22, 1995

Appendix A

Order No. 27A	Supplemental items relating to Revised Settlement Program, including listing of brand names; filed December 29, 1995
Order No. 28	Denying Dow Chemical's Motion to Reconsider; entered December 26, 1995
Order	Denying General Electric's Motion for Summary Judgment; entered March 20, 1996
Order No. 30	Pretrial and Revised Case Management Order (this order), with Exhibit B (to be entered shortly)
Stipulation	Regarding Potential Objections to Documents; to be entered shortly

A single copy of these documents will be provided to each Remand Court, which may, if its rules so require, copy these documents for inclusion in the case file of individual actions rather than merely filing in a master file for that court.